Supreme Court, U.S.
FILED
SEP 30 1971
E. ROBERT SEAVER, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5307

JOSEPH SUBILOSKY,
PETITIONER,

v.

ROBERT J. MOORE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General, Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General, Chief, Appellate Section
CHARLES E. CHASE
Assistant Attorney General

Of Counsel:
WHITNEY LEWENDON

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
A. Judge Whittemore's Findings	4
B. Judge Cutter's Findings	6
Argument	
I. The Lower Court Was Correct in Finding that the Use of Evidence of Prior Convictions for the Purpose of Impeachment Was, in the Circumstances of this Case, Harmless Beyond a Reasonable Doubt	8
II. The Court Below Erred in Ruling that the Burgett Exclusion of the Use of Prior Uncounseled Convictions to Support Guilt or Enhance Punishment Extended to the Use of such Convictions for the Sole Purpose of Impeaching the Credibility of the Petitioner	13
III. Even if the Burgett Principle Applies to Impeachment, the Court Below Erred in Holding that It Is Retroactive	16
Conclusion	18

Table of Citations

Cases

Burgett v. *Texas,* 389 U.S. 109 (1967) 3, 14, 16, 17, 18
Chapman v. *California,* 386 U.S. 18 (1966) 13
Commonwealth v. *Subilosky,* 352 Mass. 153, 224 N.E.2d 197 ..... 3, 4, 5, 6
Desist v. *United States,* 394 U.S. 244 (1969) 17, 18

Page

Gilday v. *Scafati*, 428 F.2d 1027 (1st Cir. 1970), *cert. denied* 400 U.S. 926 (1970) 4, 12, 13, 14, 16, 17
Gideon v. *Wainwright*, 372 U.S. 335 14
Griffin v. *California*, 380 U.S. 609 (1965) 16
Harrington v. *California*, 395 U.S. 250 (1969) 13
Harris v. *New York*, 401 U.S. 222 15
Howard v. *Craven*, 306 F.Supp. 735 (D.C. Cal. 1969) .. 13
Johnson v. *Maryland*, 263 A.2d 232 14
Johnson v. *New Jersey*, 384 U.S. 719 (1966) 17, 18
Linkletter v. *Walker*, 381 U.S. 618 (1965) 17
People v. *Coffey*, 430 P.2d 15 14
Stovall v. *Denno*, Warden, 388 U.S. 293 (1967) 17
Subilosky v. *Scafati*, 294 F.Supp. 18 (D. Mass. 1968) .. 3
Subilosky v. *Commonwealth*, 412 F.2d 691 (1st Cir. 1969) 3
Subilosky v. *Commonwealth*, 1970 Mass. Adv. Sh. 1541, 265 N.E.2d 80 ..... 1, 3, 4, 6, 7
Subilosky v. *Moore*, 443 F.2d 334 ..... 1, 8, 12, 14, 15
Tehan v. *United States ex rel Shott*, 382 U.S. 406 (1968) 16, 17
United States ex rel Walker v. *Follette*, 443 F.2d 167 .. 15

Statutes

28 U.S.C. 1254(1) 2

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH SUBILOSKY,
PETITIONER,

v.

ROBERT J. MOORE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the court below (Pet. App. A) is reported at 443 F.2d 334. The opinion of the Massachusetts Supreme Judicial Court is reported at 1970 Mass. Adv. Sh. 1541, 265 N.E. 2d 80.

Jurisdiction

The judgment of the court below was entered on June 2, 1971. The petition for a writ of certiorari was filed on August 18, 1971. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

I. Whether the lower court erred in finding that at petitioner's state court trial the admission of records of prior convictions obtained in the absence of counsel for the purpose of impeaching the petitioner was, in the circumstances of this case, harmless beyond a reasonable doubt.

II. Whether the lower court erred in holding that the Burgett principle should be extended to exclude the use of evidence of prior convictions obtained in the absence of counsel for the sole purpose of impeaching the petitioner's credibility as a witness.

III. Whether, even if the Burgett principle may be extended to include impeachment, the lower court erred in finding that the principle applies retroactively.

Statement

After a jury trial, petitioner was convicted in the Superior Court for Worcester County of fourteen indictments in April, 1966.[1] The petitioner was sentenced to life

[1] Petitioner was indicted for murder, indictment #24369; 3 indictments for robbery while armed #24368, 24370, 24371; 3 indictments for putting persons in fear for stealing from a bank, #24372, 24373, 24374; 3 indictments for assault by means of a dangerous weapon, to wit a gun, #24375, 24376, 24377; larceny of an automobile,

on the murder indictment[2] and to concurrent terms on the other charges except that the conspiracy indictment was placed on file with the petitioner's consent.[3] The petitioner appealed and on March 3, 1967, the convictions were affirmed. *Commonwealth* v. *Subilosky,* 352 Mass. 153, 224 N.E. 2d 197.

Following the decision in *Burgett* v. *Texas,* 389 U.S. 109 (November 13, 1967), the petitioner filed a petition for habeas corpus. *Subilosky* v. *Scafati,* 294 F. Supp. 18 (D. Mass. 1968). This petition was denied on the ground of exhaustion. The United States Court of Appeals for the First Circuit affirmed the denial on that basis. *Subilosky* v. *Commonwealth,* 412 F.2d 691 (1st Cir. 1969).

Petitioner filed a writ of error with one assignment of error.[4] Findings of fact were made by Judge Reardon. Four convictions, one dated 1937, and three dated 1940, were found to have been obtained at a time Subilosky had no counsel and could not afford counsel. *Subilosky* v. *Commonwealth,* 1970 Mass. Adv. Sh. 1541, 1542, 265 N.E. 2d

---

#24378; the unlawful carrying of a firearm, #24379; breaking and entering in the daytime with intent to commit larceny, #24380; and conspiracy to steal money from the Worcester County Institution for Savings, #24322. (Tr. 2002, 2003, 2004, 2005, 2006, 2007, 2008). References "(Tr.)" are to the state court trial transcript which was introduced as an exhibit in the federal district court.

[2] Tr. 2011.

[3] Tr. 2012, 2013, 2014.

[4] The assignment of error read as follows:

"A"

ASSIGNMENT OF ERROR

The admission into evidence of the certified records of conviction from the Superior Courts of Middlesex, Norfolk and Suffolk Counties for purposes of impeaching the petitioner's credibility resulted in his having been denied due process of law under the Fourteenth Amendment to the Constitution of the United States, because the six records of conviction were obtained at a time when petitioner neither was represented by counsel nor had knowingly and intelligently waived his right to counsel.

Filed, July 3 , 1969

JOHN E. POWERS, *Clerk*

80, 82. The two later convictions were found to have been at a time Subilosky had counsel. The writ of error was denied on the ground that error, if any, was harmless beyond a reasonable doubt. 1970 Mass. Adv. Sh. at 1547, 265 N.E. 2d at 85.

The only issue actually decided by the Supreme Judicial Court was that error, assuming it to be error, was harmless beyond a reasonable doubt. 1970 Mass. Adv. Sh. at 1547, 265 N.E. 2d at 85.

Subilosky filed a new petition for habeas corpus with the United States District Court for the District of Massachusetts which was denied by Judge Ford on the ground that the Supreme Judicial Court was correct in finding that any error was harmless beyond a reasonable doubt. *Gilday* v. *Scafati,* 428 F.2d 1027 (1st Cir. 1970), cert. denied, 400 U.S. 926 (1970). A certificate of probable cause was issued on February 17, 1971, by Judge Ford.

On June 2, 1971, the court below, although noting that "We have held both that *Burgett* applies to the use of uncounseled convictions 'to impeach credibilty' and that it is retroactive, *Gilday* v. *Scafati,* 1st Cir., 1970, 428 F.2d 1027, cert. denied 400 U.S. 926, 91 S. Ct. 188, 27 L. Ed. 2d 186," held that the trial court's error was harmless beyond a reasonable doubt, and affirmed the District Court's denial of the petition.

In the original appeal to the Supreme Judicial Court Judge Whittemore found that the evidence introduced permitted the following facts to be found. In our view his findings are fairly supported by the record as a whole. Reference to the facts are made both to the transcript and to Judge Whittemore's opinion.

A. Judge Whittemore's Findings

Judge Whittemore found that the evidence permitted the jury to find the following facts (352 Mass. 153, 155).

That four men got out of a stolen automobile and entered a branch office of the Worcester County Institution for Savings on West Boylston Street in Worcester (Tr. 1022, 1034, 1069, 1145, 1146, 1163, 1179, 1533-1543, 1618). He noted that some witnesses saw only three men (Tr. 1330, 1362, 1417, 1503, 1826, 352 Mass. at 155, 156, fn. 1). He noted that the owner and rightful user of the car, which was stolen and used as the get-away vehicle, had not left articles therein which indicated the involvement of four persons in the activity (Tr. 1533, 1538, 1539, 1618-1621, 352 Mass. at 156, fn. 1).

The defendant Subilosky was identified as the killer by Mrs. Judith Dillon (Tr. 1034, 1045, 1046, 1106, 352 Mass. at 155).

The stolen car was spotted by a police cruiser and followed (Tr. 1113, 1116, 352 Mass. at 155). Shortly thereafter, the car crashed and three men were seen running from the vehicle (Tr. 1442, 1444, 1446, 1786, 1795, 352 Mass. at 155). The men were captured soon after (Tr. 1123, 1125, 1126, 1453, 1454, 1463). Judge Whittemore found that Subilosky was not one of the three (352 Mass. at 155).

Judge Whittemore found that Mrs. Hebert testified that the defendant had told her he was involved but had not shot the bank manager (Tr. 1247, 1256, 1269, 1270, 352 Mass. at 156).

The defendant was seen in Worcester at approximately 10:30 p.m. with a round bottle of liquor labelled "J.W. Dante" (Tr. 1557, 1563, 352 Mass. at 156).

One Dr. Burrow testified that between August 26, 1965, and September 2, 1965, his house was broken into and a jacket and a round bottle of liquor labelled "J.W. Dante" had been taken (Tr. 1494, 1495, 1500, 352 Mass. at 157).

Mrs. Hebert turned over a jacket to the police, which she said Subilosky left there (Tr. 1262, Ex. 15, 352 Mass.

at 156, fn. 2). The pants matching the jacket were turned over to the police by Dr. Burrow (Tr. 1496, Ex. 35, 352 Mass. at 156, fn. 2).

Judge Whittemore found that Subilosky testified that he was drinking in various bars (Tr. 1697-1706, 1735-1743, 352 Mass. at 157); that Richard Hebert had given him the liquor labelled "J.W. Dante" and the straw hat (Tr. 1704, 352 Mass. at 157). The defendant admitted he purchased the .357 magnum (Tr. 1215, 1686, 1758, 352 Mass. at 157). Judge Whittemore found that Subilosky testified that he fled the jurisdiction and went to Kansas City fearing that he would be involved because of the gun (Tr. 1718, 1719, 352 Mass. at 157).[5]

In his opinion, which denied the writ of error, Judge Cutter incorporated Judge Whittemore's opinion (fn. 5, 265 N.E. 2d at 83-84) and found facts which are fairly supported by the record as a whole.

B. Judge Cutter's Findings

Subilosky testified that in 1966 he was forty-five years old (Tr. 1682, 265 N.E. 2d at 84). He testified that in his

---

[5] Judge Whittemore's finding that the magnum fired the fatal shot is, we think, a reasonable inference on this record. All the witnesses testified to one shot in the bank (Tr. 1034, 1160, 1161, 1163-1164, 1179, 1337, 1360, 1379, 1382, 1396, 1405, 1416, 1470). One bullet had been fired from the magnum gun, Exhibit 7, when found in the Shaw car (Tr. 1315, 1317, 1318, 1588, 1589). Saunders, just prior to being arrested and apprehended had a small silvery gun (Exhibit 29) which he fired at the police officer (Tr. 1320, 1449, 1454, 1459, 1460). One bullet only had been expended from that gun (Tr. 1589, 1590). The third gun, Exhibit 6, was in the car and had not been fired (Tr. 1202, 1318, 1319, 1590). Two shots were fired by police officers (Tr. 1459) thereby accounting for all the shots fired during this episode. Witnesses heard three shots (Tr. 1139, 1459, 1460).

Three of the Bennetts testified they heard shots at the capture but did not testify to any number (Tr. 1793, 1814, 1819). In any event, those shots could not have come from Exhibits 6 and 7 which were found in the car (Tr. 1201, 1314).

Thus, the only gun recovered that day which could have fired the fatal shot was the magnum, Exhibit 7, Subilosky's gun.

early years he was "in a great deal of difficulty with the police" and spent "a substantial amount of time in state prison." (Tr. 1682, 265 N.E. 2d at 84). He testified that "I've lived in prison all my life. I was born out of a wall of a prison." (Tr. 1718, 265 N.E. 2d at 84).

Mr. Subilosky testified he was released from prison on July 8, 1965 (Tr. 1683, 1721, 265 N.E. 2d at 84).

Mr. Subilosky testified that about a week and a half before the August 27, 1965, robbery, he bought a .357 magnum pistol from a truck driver in a tavern in Brighton (Tr. 1686, 1758, 1759, 265 N.E. 2d at 84). This pistol was found in the automobile abandoned after the robbery (265 N.E. 2d at 84). Counsel for Subilosky stipulated it belonged to Subilosky (Tr. 1215, 265 N.E. 2d at 84). Subilosky identified the gun on direct examination (Tr. 1686). Subilosky testified he used the gun for target practice (Tr. 1687, 265 N.E. 2d at 84).

Subilosky testified that he gave the gun to one Saunders four days before the robbery (Tr. 1687, 1688, 265 N.E. 2d at 84).

Subilosky testified that there had been no work for him the afternoon of the robbery, August 27, 1965 (Tr. 1691, 1692, 1732, 265 N.E. 2d at 84).

Subilosky admitted seeing Saunders on the afternoon of August 27, 1965, (Tr. 1697, 1698, 1737; 265 N.E. 2d at 84).

Subilosky testified he'd been drinking "a lot" in various bars until he went to the home of Mr. and Mrs. Hebert (Tr. 1697-1706, 1735-1743, 265 N.E. 2d at 84).

Subilosky testified that when Mrs. Hebert read aloud the account of the robbery and "came to Saunders name", he said to her "I gave that kid a gun . . . . I might be in trouble" (Tr. 1713, 1719, 265 N.E. 2d at 84).

Subilosky testified he went to his niece's home in Northboro, then to Boston and he "took a freight out" and went

to Kansas City, Missouri, arriving there approximately two weeks later (Tr. 1717, 1718, 1749, 1750, 1751, 1752, 265 N.E. 2d at 84).

After the questioned records were used the trial judge instructed the jury on their limited purpose (Tr. 1766, 1767, 265 N.E. 2d at 84) and the judge repeated the instruction at the close of the charge (Tr. 1198, 265 N.E. 2d at 84).

In finding that the introduction of records of four convictions in 1937 and 1940 was harmless beyond a reasonable doubt the Court of Appeals for the First Circuit emphasized the evidence that "four robbers were placed in the bank. Four hats, and four pairs of gloves were found in or near the smashed-up get-away car. The defendant was traced to the environs of the smash up. He was positively identified as being in the bank and doing the shooting." (443 F.2d at 336).

Argument

I. The Lower Court Was Correct in Finding that the Use of Evidence of Prior Convictions for the Purpose of Impeachment Was, in the Circumstances of this Case, Harmless Beyond a Reasonable Doubt.

The Court of Appeals for the First Circuit found that the detail added by the admission of the four uncounseled convictions was insignificant as compared to the proper admission of two later convictions; that the record of these two later convictions, considered with the abundance of other evidence, constituted overwhelming grounds for finding petitioner guilty of the charges. The admission of the uncounseled convictions was therefore harmless error. 443 F.2d at 334.

The evidence adduced at trial clearly established peti-

tioner's guilt. Petitioner himself testified that on August 27, 1965, the day of the robbery, he was in the Worcester area (Tr. 1696, 1697-1706, 1735-1743). He himself testified that in the late afternoon he was with Saunders and a "Red."[6] (Tr. 1698). His counsel stipulated and he himself admitted on direct that the .357 Magnum gun found in the stolen automobile belonged to him (Tr. 1215, 1686). He testified on direct that he had given this gun to Saunders 4 days prior (Tr. 1687, 1688). His brother-in-law, Ralph D'Angelo, testified that the gun was kept in his (D'Angelo's) bedroom and that he had last seen it on Wednesday, (2 days before the robbery) (Tr. 1236, 1237). D'Angelo testified that he was going to register the gun (Tr. 1235).

Subilosky testified that he gave the gun to D'Angelo (Tr. 1686). That he later gave it to Saunders (Tr. 1687). He didn't tell D'Angelo that he had taken the gun or that he had given it to Saunders (Tr. 1759).

Petitioner testified that he learned the names of the 3 co-defendants the next morning at Mrs. Hebert's house (Tr. 1716). He then went to his niece's house in Northboro and told her he was "in a little trouble" and then fled the jurisdiction of the Commonwealth (Tr. 1713, 1719). Petitioner testified on direct testimony that he fled the jurisdiction because he did not want to go back to prison (Tr. 1679, 1719). Despite petitioner's present argument that such fear is a reasonable reaction of an innocent man with a past record of convictions, it clearly is as reasonable if not more reasonable to infer that the petitioner was simply afraid that his deep complicity in the events would be detected.

---

[6] There was some evidence at the trial that Shutt, one of three other men who pled guilty to the charges, was known as "Red" (Tr. 1270, 1278). His hair was described as having a red tint to it (Tr. 1588).

Petitioner was with Saunders and "Red" for an hour and one half just prior to the robbery but claims to have been alone at approximately 5:00 p.m. (Tr. 1699, 1739). At approximately 5:15, Judith Shaw found that the green Chevrolet had been taken (Tr. 1534, 1535).

Petitioner was positively identified by one of the bank tellers (Tr. 1034, 1044, 1045, 1046, 1106). On cross-examination, the teller testified she had picked Mr. Subilosky out of a seven man line-up (Tr. 1102).[7]

Mrs. Dillon testified that Mr. Subilosky pointed the gun directly at her (Tr. 1043). The gun was pointed at the tellers and nowhere else (Tr. 1051). Mrs. Dillon testified that her attention was directed to the man who fired the shot (Tr. 1093). [In our view, a valid reason for remembering Mr. Subilosky].

Mrs. Dillon testified two of the men wore stocking masks (Tr. 1059). Two stocking masks were recovered (Tr. 1202, 1203, Ex. 9, 1429, 1430, Ex. 34, 1586). Mrs. Dillon testified that one gun had a long, dark barrel, and the other was a short barrel gun (Tr. 1052, 1092). Exhibit 6 is a short barrel gun (Tr. 1291). Exhibit 7 is a long barrel gun (Tr. 1201). Both Exhibits 6 and 7 were found in the get-away car and this fact was stipulated to by the petitioner (Tr. 1314).

Mrs. Dillon saw two guns (Tr. 1092). Mr. Prachniak, the other teller, saw two guns (Tr. 1148).

Mrs. Dillon identified the killer as tall with brown hair (Tr. 1075, 1077). Mr. Prachniak testified the killer was six feet tall with brown hair (Tr. 1178). The height of the other defendants was testified to at trial (Tr. 1586, 1587, 1588, 1170, 1177, 1178, 1179).

Both put the robber who shot in the same corner of the bank (Tr. 1045, 1046, 1179).

---

[7] The witness had not been shown petitioner's picture by the police, but it had been in a newspaper; the date of the lineup and date the picture was in the paper are not in the transcript (Tr. 1103).

At no time during her testimony was Mrs. Dillon's identification of Subilosky shaken. Petitioner's present attempt to discredit Mrs. Dillon's testimony is clearly groundless. Petitioner overlooks the obvious fact that Mrs. Dillon was in the best position to obtain the clearest view of the robbers. Certainly her emotional reaction to the shooting is understandable, but such behavior should in no way undercut her recollection of events precedent to that act; the strength of her ability to recall the event is attested to by the evidence — two masks, description of the guns, of the location of the man who fired the shot — and by corroboration per Mr. Prachniak.

Mr. Prachniak, the other teller, observed four robbers (Tr. 1146). Two were masked (Tr. 1145). Mr. Prachniak observed that one robber was wearing a sports jacket and was carrying a gun with a "long nozzle" (Tr. 1178). Mr. Prachniak observed Mr. Shutt with the short gun (Tr. 1177). Subilosky testified that on August 27, 1965, he was wearing a sports jacket he had bought with his money from prison (Tr. 1707).

There was evidence that four men robbed the bank from the bank tellers and others. (Tr. 1022, 1034, 1146, 1179, 1344, 1533-1543, 1618). Three and a half pairs of gloves were found in the get-away car (Tr. 1569, Exs. 38, 29, 40 and 42). The other glove was found in the vicinity of the car crash (Tr. 1598, 1601, [illegible]). There were two soft hats and a baseball cap [illegible] get away car and a soft hat just outside the car (Tr. [illegible], 1313, 1569, 1577, 1888). A pair of loafers was found [illegible] the area where the car crashed (Tr. 1431, 1581, Ex. 49). The three arrested near the car crash had their shoes (Tr. 1572, 1576, 1577, Exs. 43, 44, 46 and 47) (pictures of Stooke, Shutt, and Saunders taken that evening).

Thus, as the evidence showed, and as the court below found, petitioner was positively identified by one witness

as the person who fired the fatal bullet. Other evidence showed that, shortly after the armed robbery, petitioner was in possession of certain items which had been stolen from a home a short distance from the place where the get-away car crashed. Evidence of four hats and four pairs of gloves, plus testimony placing four men in the bank, constituted persuasive grounds that Subilosky was present in the bank. Finally, the evidence showed that petitioner owned the weapon which fired the fatal bullet and that he had admitted his complicity in the robbery to another person. This evidence conclusively showed that petitioner committed the crimes as charged, and it is clear that the jury rejected petitioner's testimony with respect to alibi, not because of the record of conviction admitted against him, but simply because of the inherent incredibility of that testimony when tested against the other evidence admitted against him.

The court below specifically rejected petitioner's contention that the case was close on the evidence. The evidence, as set out above, was found to be highly persuasive. 443 F.2d 335.

Against the background of overwhelming evidence and the admission of two valid convictions, petitioner has failed to demonstrate that he was at all prejudiced by introduction of the four records of conviction which had been obtained in the absence of counsel. In *Gilday* v. *Scafati,* 428 F.2d 1027, cert. denied 400 U.S. 926, the Court of Appeals for the First Circuit noted that when uncounseled convictions are admitted into evidence the fact that counseled convictions are also introduced into evidence, is a relevant factor in assessing application of the harmless error doctrine. In that case, the admission was deemed inconsequential as compared to the admission of valid convictions and the inherent incredibility of the defendant's own testimony. In the present case, the two valid

convictions were obtained in 1958, whereas the four uncounseled convictions were rendered in 1937 and 1940. Clearly, petitioner's contention that his conviction was based on the earlier convictions is groundless. The jury could obviously have chosen to discredit petitioner's testimony solely on the basis of the 1958 armed robbery convictions and petitioner thus cannot complain of prejudice. *Howard* v. *Craven,* 306 F. Supp. 735 (D.C. Cal. 1969).

In summary, the evidence consisting of petitioner's incriminating admissions, his presence in Worcester, his possession of items from Dr. Burrow's house, his ownership of the .357 magnum gun, his presence with Saunders on the day of the robbery, his flight, the finding of four pair of gloves, the finding of the loafers, the fact that he fitted one teller's description of the killer, the fact that he was positively identified by the other teller, the testimony of his admission to Mrs. Hebert and the admission of the two valid convictions amply justify and support the lower court's finding that the admission of the four uncounseled convictions was harmless beyond a reasonable doubt. *Gilday* v. *Scafati,* 428 F.2d 1027, cert. den. 400 U.S. 926, (1st Cir. 1970); cf. *Harrington* v. *California,* 395 U.S. 250 (1969); *Chapman* v. *California,* 386 U.S. 18 (1966).

II. The Court Below Erred in Ruling that the Burgett Exclusion of the Use of Prior Uncounseled Convictions to Support Guilt or Enhance Punishment Extended to the Use of such Convictions for the Sole Purpose of Impeaching the Credibility of the Petitioner.

In petitioner's appeal of the denial of his petition for a writ of error to the Massachusetts Supreme Judicial Court, that Court only assumed, for the purpose of decid-

ing the issue, that the admission of the prior uncounseled convictions was error. The Court of Appeals for the First Circuit relied on its former holding in *Gilday* v. *Scafati,* 428 F.2d 1027, cert. den. 400 U.S. 926, that the *Burgett* principle prohibited the use of uncounseled convictions to impeach credibility. 443 F.2d at 335. However, this Court has never reached the issue of admissibility of uncounseled convictions for the sole purpose of impeaching credibility.

In the case of *Burgett* v. *Texas,* 389 U.S. 109, this Court said that "to permit a conviction obtained in violation of *Gideon* v. *Wainwright* (372 U.S. 335) to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case." 389 U.S. at 115. In *Burgett* records of uncounseled convictions were introduced as part of the indictment, in order to activate the enhanced punishment provisions of a Texas recidivist statute. No question was presented to this Court concerning the use of such convictions to impeach credibility; furthermore, this Court has not subsequently directed itself to that narrow question.

The Court of Appeals for the First Circuit in the *Gilday* case applied *Burgett* to impeachment because it assumed that "the obvious purpose and likely affect of impeaching the defendant's credibility is to imply, if not prove, guilt." 428 F.2d at 1029. Further propositions, that use of otherwise inadmissible evidence for impeachment violates the defendant's constitutional rights, rest on the basic assumption that there is no significant distinction between impeaching a defendant's credibility and proving his guilt. Yet the First Circuit failed to support its assumption by identifying the sources of its reasoning. Other cases which the First Circuit cites as supporting its conclusion, *People* v. *Coffey,* 430 P.2d 15, and *Johnson* v. *Maryland,* 263 A.2d 232, also reason in similar fashion

that the question of credibilty is inseparable from the question of guilt.

However, there are both reasonable and necessary distinctions to be made between questions of credibility and questions of guilt. The evidence which may serve to discredit a witness' testimony need not involve any affirmative proof of guilt. Carefully drawn instructions to the jury concerninig the narrow use of impeachmeht evidence can serve to emphasize such distinction. Moreover, in the case of a defendant who offers testimony, the question of credibility immediately arises, and constitutes a compelling state concern. Particularly where the defendant voluntarily testifies, and puts his credibility in issue thereby, it is an obvious and reasonable practice for the state to challenge the defendant's reliability.

Similar considerations influenced the Court of Appeals for the Second Circuit to hold that prior uncounseled convictions may be used to impeach the credibility of a defendant who testifies. *United States ex rel Walker* v. *Follette,* 443 F.2d 167. In that case a defendant testified, and contradicted the testimony of a prosecution witness. Reasoning that this Court's decision in *Harris* v. *New York,* 401 U.S. 222, (which allowed the admission of a statement illegally obtained for the sole purpose of evaluating the defendant's credibility) controlled the disposition of the case before it, the Second Circuit allowed the admission of evidence which would be otherwise inadmissible because the defendant had placed his credibility in issue. 443 F.2d at 170.

The considerations which applied to *Follette* apply as well to the present case. As the court below found, petitioner introduced the general subject of his previous convictions. 443 F.2d at 336. Moreover, petitioner's testimony contradicted the testimony of the Commonwealth's witness, Mrs. Hebert. In addition, petitioner's defense of

alibi rested solely on his own testimony. None of petitioner's alibi witnesses could testify to his whereabouts on the afternoon of the robbery. Each testified to the morning hours (Tr. 1766, 1781, 1823-1824). Others (three of the four Bennetts) testified to seeing three men after the auto crashed (Tr. 1786, 1795, 1808, 1829, 1830). Clearly, petitioner's credibility was in issue, placed there by his own testimony.

None of the records of past convictions served as proof of petitioner's guilt, and related solely to the issue of his credibility. In this circumstance, petitioner's contention that his conviction was based upon use of otherwise inadmissible evidence is groundless. Similarly, the fear in *Gilday* that the use of the records of conviction violates a defendant's constitutional rights, 428 F.2d at 1030, is answered by the fact that the evidence is used solely to discredit testimony, and not as affirmative proof of guilt. Therefore, admission of records of prior uncounseled convictions for the sole purpose of impeachment should not be held to constitute error.

III. Even if the Burgett Principle Applies to Impeachment, the Court Below Erred in Holding that It Is Retroactive.

In its *Burgett* decision this Court did not face the issue of retroactive application of the principle it announced therein, and has not subsequently directed itself to that question.

In determining whether to apply other principles retrospectively, this Court has given considerable weight to the burden such application would impose on the administration of justice. For instance, in refusing to give the "no comment rule" of *Griffin* v. *California,* 380 U.S. 609 (1965) retroactive application in the case of *Tehan* v.

United States ex rel Shott, 382 U.S. 406 (1968), this court indicated that its refusal to do so was based on the ". . . impact upon the administration of their (referring to the states) criminal law so devastating as to need no elaboration." 382 U.S. at 419. See also *Linkletter* v. *Walker,* 381 U.S. 618, 636 (1965); *Johnson* v. *New Jersey,* 384 U.S. 719, 729 (1966); *Stovall* v. *Denno, Warden,* 388 U.S. 293, 297 (1967); *Desist* v. *United States,* 394 U.S. 244 (1969). To say that collateral attacks are permissible on convictions obtained prior to the date of *Burgett* (November 13, 1967) would raise doubts as to the validity of countless convictions in cases where the defendant took the witness stand and was impeached by use of prior convictions, which use had been carefully limited by instructions of the trial courts.

In addition, successful retrials would in most cases be rendered impossible due to the unavailability of witnesses due to the passage of time.

A further consideration in determining the application of the *Burgett* principle is the extent of reliance by police and courts alike on the permissible use of records of prior uncounseled convictions, solely for impeachment, prior to the *Burgett* decision. *Desist* v. *United States,* 394 U.S. at 249. While the *Gilday* court correctly noted that the right to counsel had been recognized in the 1930s and established unanimously in 1963, 428 F.2d at 1030, it is nonetheless clear that no rule had been established then, nor has one since been formulated by this Court, governing the use of uncounseled convictions solely for impeachment purposes. Courts have nonetheless instituted safeguards for the rights of defendants by drawing carefully defined instructions as to the use of such evidence. In the absence of a governing principle, and considering the reasonableness of rules to limit the use of impeachment evidence, the practices of the courts prior to the *Burgett* decision

in admitting evidence of uncounseled convictions should have considerable weight. *Desist* v. *United States,* 394 U.S. at 250, *Johnson* v. *New Jersey,* 384 U.S. at 731.

Retroactive application of the *Burgett* decision will both impose an undue burden on the administration of justice, and ignore the reasonable reliance of courts on practices permissible prior to *Burgett.* It is submitted that the *Burgett* principle should not be applied retroactively.

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.
Assistant Attorney General,
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General,
Chief, Appellate Section
CHARLES E. CHASE
Assistant Attorney General

Of Counsel:
WHITNEY LEWENDON